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No. 85 1409

In the Supreme Court of the United States

OCTOBER TERM, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals correctly invalidated a regulation promulgated by the Secretary of Health and Human Services, 20 C.F.R. 404.1520(c), which provides that a person seeking Social Security disability benefits will be found not to be disabled if he does not have a medically "severe" impairment that significantly limits his ability to do basic work activities.

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The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 774 F.2d 1365. The order of the district court (App., *infra*, 14a) and the recommendation of the magistrate (App., *infra*, 15a-19a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1985. By order dated January 14, 1986, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including February 21, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 223(d)(1)(A) and (2)(A), 1614(a)(3)(A) and (B) of the Social Security Act, as codified at 42 U.S.C. 423(d)(1)(A) and (2)(A), 1382c(a)(3)(A) and (B); Sections 223(d)(2)(C), 1614(a)(3)(G) of the Social Security Act, as added by Section 4 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1800-1801 (to be codified at 42 U.S.C. 423(d)(2)(C), 1382c(a)(3)(G)); and 20 C.F.R. 404.1520, 404.1521, 416.920, 416.921 are reproduced at App., *infra*, 30a-36a.

STATEMENT

The court of appeals in this case invalidated a regulation that is an integral part of the sequential evaluation process established by the Secretary of Health and Human Services for determining whether a person seeking Social Security disability benefits is disabled. The regulation provides that if the claimant does not have a medically "severe" impairment—defined to mean an impairment that significantly limits a person's mental or physical ability to do the basic work activities that are necessary for most jobs—the claimant will be found not to be disabled.

A. THE STATUTORY AND REGULATORY FRAMEWORK

Title II of the Social Security Act provides, inter alia, for the payment of insurance benefits to a person who is "under a disability." 42 U.S.C. 423(a)(1)(D). Disability benefits also are provided under the Supplemental Security Income (SSI) program established by Title XVI of the Act. 42 U.S.C. 1382(a). The term "disability" is defined to mean

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months[.]

42 U.S.C. 423(d)(1)(A); see also 42 U.S.C. 1382c(a)(3)(A).

The Act further provides in relevant part that an individual

> shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. 423(d)(2)(A), 1382c(a)(3)(B).

To implement these statutory definitions, the Secretary has by regulation established a five-step "sequential evaluation" process to be followed in determining whether a claimant is disabled. 20 C.F.R. 404.1520, 416.920. See *Heckler* v. *Campbell*, 461 U.S. 458, 460 (1983). At step 1, the decision-maker (either the state agency or the administrative law judge (ALJ)) determines whether the individual is engaged in work that constitutes substantial gainful activity. If so, he is found not to be disabled. 20 C.F.R. 404.1520(b), 416.920(b).

If the claimant is not engaged in substantial gainful activity, the sequential evaluation process continues to step 2, which is at issue in this case. At step 2, the decision-maker determines whether the individual has demonstrated the existence of a medically "severe" impairment or combination of impairments. 20 C.F.R. 404.1520(c), 416.920(c). An impairment is not "severe" if it does not "significantly limit [the claimant's] physical or mental ability to do basic work activities" (20 C.F.R. 404.1521(a),

416.921(a)). The regulations in turn define the term "basic work activities" to mean "the abilities and aptitudes necessary to do most jobs" (20 C.F.R. 404.1521(b), 416.921(b)), which are identified as: (1) "[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling"; (2) "[c]apacities for seeing, hearing, and speaking"; (3) "[u]nderstanding, carrying out, and remembering simple instructions"; (4) "[u]se of judgment"; (5) "[r]esponding appropriately to supervision, co-workers and usual work situations"; and (6) "[d]ealing with changes in a routine work setting" (20 C.F.R. 404.1521(b), 416.921(b)). If the claimant does not have an impairment that significantly limits his ability to do these basic work activities, he will be found not to be disabled at step 2, without specific consideration of his age, education, and work experience. 20 C.F.R. 404.1520(c), 416.920(c).

If the claimant is found to have a "severe" impairment, the decision-maker then must determine at step 3 of the sequential evaluation process whether the impairment is so serious as to be equal in severity to one of the listed impairments that are deemed to be disabling on medical grounds alone, without specific consideration of the claimant's age, education, and work experience. 20 C.F.R. 404.1520(d), 416.920(d); 20 C.F.R. Pt. 404, Subpt. P, App. 1. If the individual's impairment is not one that is automatically deemed disabling at step 3, the decision-maker then must determine at step 4 whether the impairment prevents the individual from performing his own past work. If the claimant is still able to do his past work, he is found not to be disabled. 20 C.F.R. 404.1520(e), 416.920(e). But if the claimant cannot do his past work, the decision-maker must determine at step 5 whether, in light of the claimant's age, education, and work experience, he nevertheless can perform other work that exists in the national economy. At this final step, the

Secretary ordinarily applies the medical-vocational guidelines that were sustained by this Court in *Heckler* v. *Campbell, supra.*[1]

B. THE PROCEEDINGS IN THIS CASE

1. Respondent applied for Social Security disability benefits and SSI benefits in October 1980 (R. 82, 86).[2] After her claim was denied by the state agency, respondent requested a hearing before an ALJ. Respondent alleged that she was disabled on the basis of labyrinthe (inner ear) dysfunction with occasional episodes of dizziness, loss of visual focus, and flat feet (App., *infra*, 15a, 26a).

Following the hearing, the ALJ concluded that respondent's impairments were not severe and denied her claim (App., *infra*, 24a-27a). The record showed that respondent was 45 years old and had a high school education, two years of business college, and real estate training (*id.* at 26a). From 1963 to 1977, she had been employed as a travel agent (*id.* at 15a, 26a; R. 52). From September 1978 through September 1979, with interruptions due to illness, respondent worked in real estate sales (App., *infra*, 15a); she testified that "the market kind of just fell because of the high interest rates and so I left that job in September of 1979" (R. 52). The ALJ found that "[m]ultiple tests given [to respondent] failed to divulge objective clinical findings

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[1] The sequence in which the severity of an impairment is considered is somewhat different under the recently promulgated regulations governing the evaluation of claimants who already are receiving disability benefits. See 50 Fed. Reg. 50135-50136, 50142-50143 (1985), adding 20 C.F.R. 404.1594(f), 416.994(b)(5). The different sequence was adopted in order to take account of the new medical improvement standard enacted in Section 2 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794-1799. This case involves a new applicant for benefits, not a current recipient, and it therefore is governed by the regulations discussed in the text.

[2] "R." refers to the transcript of the administrative record that was certified to the district court pursuant to 42 U.S.C. 405(g).

of abnormalities that support [respondent's] severity of the stated impairments" (App., *infra*, 27a), observing that respondent was successfully pursuing a "relatively difficult" two-year community college training plan for computer programming (*id.* at 27a-28a). In the ALJ's view, although the evidence revealed that respondent was not "free from episodes of dizziness, or vision problems," her scholastic success, "coupled with generally negative clinical findings" and her ability to perform various activities, such as driving her car 80 to 90 miles a week, demonstrated that her problems did not significantly limit her ability to perform basic work activities (*id.* at 28a).[3] Accordingly, the ALJ concluded that respondent had not demonstrated the existence of a severe impairment within the meaning of 20 C.F.R. 404.1520(c), 416.920(c), and therefore was not disabled (App., *infra*, at 28a-29a).

The Appeals Council denied respondent's request for review (App., *infra*, 21a-22a), explaining that additional psychological testing data submitted to the Appeals Council by respondent's representative did not undermine the ALJ's decison (*id.* at 22a):

> The over-all results of the testing indicated an average range of intellectual abilities, with no profound irregularities and the majority of skills still fully intact. Only the finger dexterity test administered showed a degree of difficulty. The Appeals Council notes in that regard that the limitations potentially imposed by the difficulty you might experience in small detailed parts dexterity does not indicate an inability to perform any substantial gainful activity. The weight

[3] The ALJ noted that Janet Mott, a vocational expert called by respondent, had testified that respondent's medical condition would preclude her from working competitively, but the ALJ concluded that the objective clinical diagnostic findings in the record did not support the existence of an impairment of that severity and that respondent "is exaggerating the effects of her impairments" (App., *infra*, 27a, 28a).

> of the entire evidence of record in your case, including the new evidence, supports the administrative law judge's finding that you do not have any significant impairment of work-related abilities.

2. Respondent then sought judicial review in the United States District Court for the Western District of Washington pursuant to 42 U.S.C. 405(g). The case was referred to a magistrate, who recommended that the district court affirm the Secretary's decision that respondent had not established that she had a severe impairment (App., *infra*, 15a-19a). The magistrate noted the testimony by respondent's vocational expert and treating physician that her impairments were disabling, but found that respondent's success in the community college program "is substantial evidence of her ability to perform basic work activities" (*id.* at 17a-19a). The magistrate also observed that this course had been sponsored by the state Department of Vocational Rehabilitation and that respondent's counsellor at that agency had expressed the view that respondent would have little problem in obtaining employment when she completed that training (*id.* at 18a). The district court adopted the magistrate's report and affirmed the Secretary's decision denying respondent's claim (*id.* at 14a, 20a).

3. The court of appeals reversed (App., *infra*, 1a-12a). The court of appeals did not reach the question whether there was substantial evidence to support the Secretary's decision that respondent had not demonstrated the existence of a severe impairment that significantly limited her ability to do basic work activities. Instead, the court held that the regulation that permits the Secretary to deny benefits at step 2 of the sequential evaluation process because of the absence of a severe impairment is invalid.[4]

[4] The court of appeals acknowledged that respondent had not challenged the regulation in district court, but it chose to consider the issue because it is "purely one of law" and "a significant question of general impact" (App., *infra*, 4a-5a).

The court therefore remanded the case to the Secretary to be reconsidered without reliance on the severity regulation.

a. The court of appeals recognized that under 42 U.S.C. 405(a), "Congress has delegated to the Secretary broad power 'to prescribe standards for applying certain sections of the [Social Security] Act' " (App., *infra*, 8a, quoting *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 40 (1981)). However, the court held that the severity regulation is inconsistent with 42 U.S.C. 423(d)(2)(A), which provides that a claimant may be found to be disabled only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." The court interpreted this provision to require the Secretary "to consider factors such as [the claimant's] age, education, work experience, and ability to do past work" in every individual disability determination, irrespective of whether the claimant has demonstrated that his impairment satisfies a threshold level of severity. App., *infra*, 5a, 9a. The court also held that the regulation is contrary to judicial decisions that it construed to mandate a two-step process, "with the claimant first showing an inability to perform [his] past relevant work, and the Secretary then showing that the claimant nevertheless retains the ability to do other work" (*id.* at 10a).

Finally, the court of appeals rejected the Secretary's contention that the Social Security Disability Benefits Reform Act of 1984 (1984 Act), supports the sequential evaluation process (App., *infra*, 8a-9a). The court conceded that Congress considered the severity regulation when it enacted the 1984 Act and failed to eliminate the requirement that the claimant demonstrate a severe impairment. However, relying on the fact that Congress had urged the Secretary to revise the severity criteria in order

" 'to reflect the real impact of impairments on the ability to work' " (*id.* at 10a, quoting H.R. Rep. 98-618, 98th Cong., 2d Sess. 8 (1984)), the court believed that the legislative history did not suggest a congressional intent to permit a finding of nondisability based on medical factors alone (App., *infra*, 10a).

b. The court of appeals acknowledged in a footnote (App., *infra*, 9a n.6) that the Secretary had adopted a new Social Security Ruling, SSR 85-28 (App., *infra*, 37a-44a), which reflected both the Secretary's ongoing reevaluation of step 2 and the Secretary's response to concerns expressed by several courts of appeals. In SSR 85-28, the Secretary explained that the severity regulation, which was promulgated in 1978[5] and revised somewhat in 1980,[6] had not been intended to alter the threshold level of impairment severity that had been in effect prior to 1978. Under the pre-1978 standard, a claimant could be found not to be disabled on medical grounds alone (*i.e.*, without consideration of his age, education, and work experience) if his impairment was "a slight neurosis, slight impairment of sight or hearing, or other slight abnormality or a combination of slight abnormalities." 20 C.F.R. 404.1502(a) (1977). Thus, the Secretary emphasized in SSR 85-28 that benefits are to be denied at step 2 only when an individual's impairments "would have no more than a minimal effect on [his] ability to work even if the individual's age, education, or work experience were specifically considered" (App., *infra*, 41a). The court of appeals recognized that SSR 85-28 interpreted the severity regulation in the same manner as that approved by five

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[5] 43 Fed. Reg. 55363, 55371 (1978), adding 20 C.F.R. 404.1503(c), 404.1504(a)(1), 416.903(c), 416.904(a)(1).

[6] 45 Fed. Reg. 55588, 55624-55625 (1980), adding 20 C.F.R. 404.1520(c), 404.1521, 416.920(c), 416.921.

other circuit courts. *Id.* at 8a-9a n.6.[7] However, the court expressed no view on the validity of the new ruling because it had not then been formally published and because the court in any event held that "the regulation it interprets is inconsistent with the Social Security Act" (*ibid.*).

REASONS FOR GRANTING THE PETITION

The court of appeals has invalidated a regulation that is an integral part of the five-step sequential evaluation process established by the Secretary of Health and Human Services to facilitate the fair, efficient, and uniform adjudication of the more than two million claims for disability benefits that are filed each year under the Social Security Act. The severity regulation serves an important screening function that makes it unnecessary to engage in a particularized vocational evaluation where a medical assessment establishes that the claimant's impairment is sufficiently insubstantial that it could not reasonably be expected to preclude all substantial gainful activity irrespective of the claimant's age, education, and work experience. The principle reflected in this regulation – that a person may denied disability benefits on the basis of medical factors alone – has been a feature of the disability program since its inception in 1954, and it has been endorsed by Congress on several occasions since that time.

The court of appeals completely disregarded the compelling legal support and practical justifications for the regulation it invalidated. Although several other courts of appeals also have invalidated the severity regulation, it has been sustained by still other courts of appeals as an appro-

[7] Citing *Farris* v. *Secretary of Health & Human Services*, 773 F.2d 85, 89-90 (6th Cir. 1985); *Estran* v. *Heckler*, 745 F.2d 340, 341 (5th Cir. 1984); *Evans* v. *Heckler*, 734 F.2d 1012, 1014 (4th Cir. 1984); *Brady* v. *Heckler*, 724 F.2d 914, 920 (11th Cir. 1984); *Chico* v. *Schweiker*, 710 F.2d 947, 954-955 & n.10 (2d Cir. 1983).

priate screening mechanism for claimants who have relatively minimal impairments. This circuit conflict warrants resolution by this Court, especially in light of the widespread class action litigation on this issue in the lower courts. It is essential that the Secretary and the state agencies know whether the severity regulation may be applied to the scores of thousands of disability claims that are filed each month.

1. As this Court observed with respect to another provision of the sequential evaluation regulations (the medical-vocational guidelines), "Congress has 'conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the [Social Security] Act' " (*Heckler* v. *Campbell*, 461 U.S. at 466, quoting *Schweiker* v. *Gray Panthers*, 453 U.S. at 43). Congress has conferred that authority in 42 U.S.C. 405(a), which authorizes the Secretary to adopt reasonable regulations to "provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same" in disability cases. "Where, as here, the statute expressly entrusts the Secretary with the responsibility for implementing a provision by regulation," a court's review "is limited to determining whether the regulations promulgated exceeded the Secretary's statutory authority and whether they are arbitrary and capricious." *Heckler* v. *Campbell*, 461 U.S. at 466. The severity regulation plainly suffers from neither defect. To the contrary, the support for the regulation in the legislative evolution of the relevant statutory provisions is overwhelming.

a. The basic definition of the term "disability," enacted by Congress in Section 106(d) of the Social Security Amendments of 1954, ch. 1206, 68 Stat. 1080, is the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental

impairment * * *." [8] The Senate and House Reports explain this definition in identical language:

> There are two aspects of disability evaluation: (1) *There must be a medically determinable impairment of serious proportions* which is expected to be of long-continued and indefinite duration or to result in death, and (2) there must be a present inability to engage in substantial gainful work by reason of such impairment * * *. The physical or mental impairment *must be of a nature and degree of severity sufficient to justify its consideration as the cause of failure to obtain any substantial gainful work.*

H.R. Rep. 1698, 83d Cong., 2d Sess. 23 (1954); S. Rep. 1987, 83d Cong., 2d Sess. 21 (1954) (emphasis added). The first of the two "aspects" of the disability evaluation articulated by the congressional reports strongly supports the Secretary's adoption of an independent threshold requirement that the impairment be of "serious proportions" from a medical perspective alone. Only if that condition is met is it necessary for the decision-maker to consider the second aspect: whether the claimant is unable to work by reason of "such impairment." The second sentence quoted from the committee reports likewise makes clear Congress's intent that the impairment must rise to a certain threshold level of severity before it may even be considered as the cause of the claimant's alleged inability to work.

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[8] In the 1954 amendments, Congress provided for the preservation of the right to old age and survivor's insurance during a period of extended disability; Congress did not then provide for the payment of benefits to a person because of his disability. See H.R. Rep. 1698, 83d Cong., 2d Sess. 22-24 (1954); S. Rep. 1987, 83d Cong., 2d Sess. 20-22 (1954). The definition of the term "disability" for purposes of the 1954 amendments is contained in Section 216(i) of the Act, 42 U.S.C. 416(i). That definition was carried forward verbatim in 42 U.S.C. 423(d)(1)(A), at issue here, when Congress enacted the Title II disability benefits program in 1956. See Social Security Amendments of 1956, ch. 836, § 103, 70 Stat. 815.

This congressional intent was implemented in the regulations issued by the Secretary in 1960 to give content to the statutory terms. As promulgated in 1960 (25 Fed. Reg. 8100), the applicable regulation provided in pertinent part (20 C.F.R. 404.1502(a) (1961) (emphasis added)):

> Whether or not an impairment in a particular case constitutes a disability * * * is determined from all the facts of that case. *Primary consideration is given to the severity of the individual's impairment.* Consideration is also given to such other factors as the individual's age, education, training and work experience. However, *medical considerations alone may justify a finding that the individual is not under a disability where the only impairment is a slight neurosis, slight impairment of sight or hearing, or similar abnormality or combination of slight abnormalities.*

The language of the regulation remained in effect in essentially identical form until 1978, when the sequential evaluation regulations were formally adopted. See pages 3-5, *supra*, and pages 20-21, *infra*. The interpretation of the Act reflected in the severity regulation therefore is a consistent and longstanding one, and it accordingly is entitled to particular deference by the courts. *Pattern Makers* v. *NLRB*, No. 83-1894 (June 27,1985), slip op. 19-20.

b. In 1967, Congress reexamined the operation of the disability program and added 42 U.S.C. 423(d)(2)(A). Pub. L. No. 90-248, § 158(b), 81 Stat. 868. The court of appeals interpreted Section 423(d)(2)(A) to prohibit the denial of benefits based on medical factors alone, without consideration of the vocational factors of the claimant's age, education, and work experience. App., *infra*, 5a, 9a. There is no support for this proposition. To the contrary, the legislative history of the 1967 amendments demonstrates that Congress was attempting to establish *more*

stringent requirements for determining disability, and that history in fact lends additional support to the validity of the severity regulation.

The 1967 amendments were enacted against the background of the regulations promulgated by the Secretary in 1960 to implement the basic definition of the term "disability" in 42 U.S.C. 423(a)(1)(A). As we have explained, those regulations expressly provided that medical considerations alone would support a finding of no disability. 20 C.F.R. 404.1502(a) (1967). Congress in 1967 did not amend 42 U.S.C. 423(a)(1)(A) or otherwise express its disapproval of this formal and settled administrative construction of the term "disability." When Congress thoroughly reexamines a statutory program and revises that program in certain respects, this Court has understood Congress to have approved those aspects of the program that it left unaltered. See *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 381-382 (1982). That conclusion is particularly compelling here.

In enacting the new 42 U.S.C. 423(d)(2)(A), Congress added an *additional* condition of eligibility: Not only is the claimant required to establish a mental or physical impairment of "serious proportions" and of "a nature and degree of severity" sufficient to justify its consideration as the cause of an inability to perform any work, as Congress intended when it enacted 42 U.S.C. 423(d)(1)(A) (see page 12, *supra*); under Section 423(d)(2)(A), a claimant who meets that requirement also must demonstrate that his "impairment or impairments are of *such severity* that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A) (emphasis added)). Nothing in this additional requirement undermines the validity of the threshold requirement that the claimant's impairment be severe.

The legislative history confirms that Congress intended no such departure from settled practice. The House and Senate Reports explain the method for determining disability that Congress contemplated when it enacted the new statutory requirement in 42 U.S.C. 423(d)(2)(A):

> The bill would provide that such an individual would be disabled *only if it is shown that he has a severe medically determinable physical or mental impairment or impairments*; that if, despite his impairment or impairments, an individual still can do his previous work, he is not under a disability; and that if, considering the severity of his impairment together with his age, education, and experience, he has the ability to engage in some other type of substantial gainful work that exists in the national economy even though he can no longer do his previous work, he also is not under a disability * * *.

S. Rep. 744, 90th Cong., 1st Sess. 48-49 (1967) (emphasis added); H.R. Rep. 544, 90th Cong., 1st Sess. 30 (1967). This description is a blueprint for the sequential evaluation process subsequently adopted by the Secretary in 1978, and the emphasized passage plainly supports the requirement that a claimant make a threshold showing that his impairment is "severe" before it is necessary for the Secretary to consider his age, education, and work experience.[9]

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[9] In enacting the further restriction in 42 U.S.C. 423(d)(2)(A), Congress responded to administrative and judicial developments that suggested that the standard of eligibility had become too relaxed, and it "reemphasize[d] the predominant importance of medical factors in the disability determination." S. Rep. 744, 90th Cong., 1st Sess. 48 (1967). This background obviously does not support the court of appeals' view (App., *infra*, 5a, 9a) that the enactment of Section 423(d)(2)(A) was intended to *prohibit* the pre-existing policy of denying benefits on the basis of medical factors alone in appropriate circumstances.

Consistent with this view, when the Secretary in 1968 promulgated comprehensive disability regulations to take account of the 1967 amendments, he carried forward the pre-existing authorization in 20 C.F.R. 404.1502(a) (1967) for the denial of benefits based on medical grounds alone. 33 Fed. Reg. 11749, 11750 (1968).[10] At the very least, the Secretary's retention of this regulation was based on a permissible construction of the 1967 amendments and their legislative history. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, No. 82-1005 (June 25, 1984), slip op. 4-7.

c. In 1978, the Secretary promulgated the first version of regulations that formally established the sequential evaluation process for adjudicating disability claims. See 43 Fed. Reg. 55349; *Heckler* v. *Campbell*, 461 U.S. at 460. Those regulations required the decision-maker to determine at step 2 whether the claimant's impairment was "severe," and they explained that "[a] medically determinable impairment is not severe if it does not significantly limit an individual's physical or mental capacity to perform basic work-related functions." 43 Fed. Reg. 55363 (1978), adding 20 C.F.R. 404.1504(a)(1). The Secretary stressed that this definition was intended to be only a "clarification" of the prior regulation, which allowed a claim to be denied where the claimant's impairment was

[10] When Congress enacted the SSI program in 1972 (Pub. L. No. 92-603, § 301, 86, Stat. 1465), it incorporated into 42 U.S.C. 1382c(a)(3)(A) and (B) the definition of the term "disability" in 42 U.S.C. 423(a)(1)(A) and (2)(A) (see 86, Stat. 1471-1472), without expressing any disapproval of the longstanding interpretation of those provisions contained in the Secretary's regulations. See S. Rep. 92-1230, 92d Cong., 2d Sess. 384 (1972). When Congress incorporates statutory provisions from one program into another in this manner, it is presumed to be aware of the interpretation of those provisions and to intend that interpretation to be applied under the second program. *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). See also *Lindahl* v. *OPM*, No. 83-5954 (Mar. 20, 1985), slip op. 12 & n.15; *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. at 381-382. Congress's action in 1972 thus lends further support to the validity of the severity regulation.

"slight" (43 Fed. Reg. 58353 (1978)); that "there is no intention to alter the levels of severity for a finding of * * * not disabled on the basis of medical considerations alone" (*ibid.*; see also *id.* at 9297); and that the regulation addresses impairments that "have such a minimal effect on the individual that they would not be expected to interfere w[illegible] his or her ability to work, irrespective of his or her age, education, and work experience" (*id.* at 9296). The same severity concept was carried forward again in 1980 when the Secretary thoroughly revised the disability regulations. See 45 Fed. Reg. 55574 (1980), adding 20 C.F.R. 404.1520, 404.1521. The Secretary explained that the more detailed provisions were expected to result in "greater program efficiency" by limiting the number of cases in which it would be necessary to follow the full vocational evaluation procedures in 20 C.F.R. 404.1545-404.1568, 416.945-416.968. See 45 Fed. Reg. 55574 (1980).

d. It was against this background that Congress thoroughly studied the Social Security disability programs in the early 1980's and enacted the Social Security Disability Benefits Reform Act of 1984. Although Congress specifically considered the severity regulation and mandated one change in its application that is not at issue here, Congress otherwise expressed its approval of the severity step.

In Section 4 of the 1984 Act, Congress added a new paragraph (C) to 42 U.S.C. 423(d)(2) and a new paragraph (G) to 1382c(a)(3). These new paragraphs now require consideration of the combined effect of multiple impairments. 98 Stat. 1800-1801. The statutory language Congress employed expressly refers to the severity determination at step 2 (emphasis added)):

> In determining whether an individual's physical or mental impairment or impairments are of a *sufficient medical severity* that such impairment or impairments

> could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a *medically severe combination* of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

The first sentence of this new paragraph on its face plainly contemplates a threshold determination of "medical severity," and the second sentence contemplates that the subsequent steps of the "disability determination process" (which include the steps at which the claimant's age, education, and work experience are considered) will be reached only "[i]f the Secretary does find a medically severe combination of impairments."

If there could be any remaining doubt about Congress's intent in 1984 to preserve the severity step of the sequential evaluation process, it is dispelled by the legislative history of Section 4 of the 1984 Act. The Senate Report states:

> [T]he Committee wishes to emphasize that the new rule [requiring the consideration of multiple impairments] is to be applied in accordance with the existing sequential evaluation process and is not to be interpreted as authorizing a departure from that process. As the Committee stated in its report on the 1967 amendments, an individual is to be considered eligible "only if it is shown that he has a severe medically determinable physical or mental impairment or impairments."[11] *The amendment requires the Secretary to determine first, on a strictly medical basis and without regard to vocational factors, whether the individual's impairments, considered in combination, are medically severe.*

[11] See S. Rep. 744, *supra*, at 48, quoted at page 15, *supra*.

S. Rep. 98-466, 98th Cong., 2d Sess. 22 (1984) (emphasis added). See also H.R. Rep. 98-618, 98th Cong., 2d Sess. 6-8, 14 (1984). The Conference Report also recognizes that "[u]nder current policies, if a determination is made that a claimant's impairment is not severe, the consideration of the claim ends at that point" (H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 30 (1984)). The Conference Report then continues (*ibid.* (emphasis added)):

> The conferees also believe that in the interests of reasonable administrative flexibility and efficiency, a determination that an individual is not disabled may be based on a judgment that an individual has no impairment, or that the *medical severity of his impairment or combination of impairments is slight enough to warrant a presumption, even without a full evaluation of vocational factors, that the individual's ability to perform SGA is not seriously affected. The current "sequential evaluation process" allows such a determination and the conferees do not intend to either eliminate or impair the use of that process.* The conferees note that the Secretary has stated that it is her plan to reevaluate the current criteria for nonsevere impairments and expect that the Secretary will report to the Committees the results of this evaluation.

Contrary to the court of appeals' view (App., *infra*, 8a-9a), it is difficult to see how Congress could more clearly have expressed its intent in 1984 to permit continued use of the severity step, and not to require the decision-maker to consider the vocational factors of age, education, and work experience at that step.[12] The fact that Congress

[12] See also 130 Cong. Rec. S11458 (daily ed. Sept. 19, 1984) (remarks of Sen. Long):

> [The Conference Committee's] language clearly indicates that Congress envisions a sequential approach to evaluating disability. The individual must first demonstrate the existence of an impairment or combination of impairments which are sufficiently severe

recognized that the *Secretary* intended to reevaluate the criteria for determining what impairments are severe under the regulation does not authorize a *court* to invalidate the regulation altogether, as the court of appeals seemed to believe (App., *infra*, 10a).[13]

Consistent with the text and legislative history of Section 4 of the 1984 Act, the Secretary, in March 1985, promulgated revised versions of 20 C.F.R. 404.1520, 404.1521, 416.920, 416.921. The revised regulations take into acccount the combined effect of multiple impairments, but otherwise leave in place the step 2 require-

from a medical standpoint as to meet the Secretary's criteria as to what could potentially be a disabling condition. If, and only if, the individual meets this test, there would be further evaluation as to whether that condition or combination of conditions does in fact preclude him from engaging in substantial work activity in the light of his age, education and work experience.

[13] The Secretary has taken several steps in furtherance of the reevaluation to which the Conference Committee referred. First, in April 1985, the Secretary rescinded SSR 82-55, which had provided a list of illustrative examples of impairments generally considered to be nonsevere. See SSR 85-III-II, at 47 (Apr. 1985). The court of appeals cited this ruling (App., *infra*, 10a-11a n.8), but without noting that it had been rescinded. Second, in November 1985, the Secretary issued SSR 85-28, discussed at pages 9-10, *supra*. SSR 85-28 emphasizes that a finding of "not severe" is made at step 2 when "medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered" (App., *infra*, 41a). In addition, the Secretary made clear to adjudicators resolving disability claims at the administrative level that "[g]reat care" should be used in applying the nonsevere concept (*id.* at 44a) and that denials at step 2 are appropriate only when the medical evidence "clearly establishe[s]" that the impact of medical impairments is minimal or slight (*id.* at 42a). By these instructions, the Secretary sought to address concerns expressed by several courts of appeals that the severity regulation had been applied in a manner that departed from the "slight impairment" standard (*id.* at 37a). See, *e.g.*, *Stone* v. *Heckler*, 752 F.2d 1099, 1102, 1106 (5th Cir. 1985); *Baeder* v. *Heckler*, 768 F.2d 547, 553 (3d Cir. 1985).

ment that the claimant demonstrate a medically severe impairment or combination of impairments that significantly limits his ability to perform basic work functions. 50 Fed. Reg. 8727-8728 (1985). The Secretary concluded in promulgating the regulations that Congress intended when it passed the 1984 Act to permit a finding of no disability to be based solely on medical considerations. See 50 Fed. Reg. 8726 (1985). That manifestly is a permissible interpretation of Congress's action. The severity regulation should have been sustained by the court of appeals on this ground alone. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, slip op. 5. But when Congress's most recent affirmation of the severity regulation is considered in light of the firmly entrenched nature of the provision in the administration of the disability program and the solid basis for the regulation in the legislative history of the 1954 and 1967 amendments, the support for the regulation is overwhelming. The court of appeals therefore clearly erred in invalidating the regulation on its face.

2. Despite the compelling support for the validity of the severity regulation, the Ninth Circuit is not alone in invalidating it.[14] The Seventh Circuit also invalidated the regulation, at least as applied to certain claimants, in an Illinois-wide class action. *Johnson* v. *Heckler*, 769 F.2d 1202 (7th Cir. 1985). Compare *Bunch* v. *Heckler*, No. 84-3102 (7th Cir. Dec. 5, 1985), slip op. 5-6 n.4. The Secretary's petition for rehearing en banc in *Johnson* was denied by an equally divided vote (776 F.2d 166 (1985)), and the Solicitor General has determined that a petition

[14] A district court, in a Ninth Circuit-wide class action, previously had held the regulation invalid and enjoined its enforcement. *Smith* v. *Heckler*, 595 F. Supp. 1173 (E.D. Cal. 1984), appeal pending, No. 85-2178 (9th Cir.). The appeal in *Smith* is currently under submission to a different panel of the Ninth Circuit, which previously had expressed its intent to defer its decision pending the panel's decision in this case.

for a writ of certiorari will be filed to seek review of the Seventh Circuit's decision. The Third Circuit, in *Baeder* v. *Heckler*, 768 F.2d 547 (1985), likewise held that the regulation is invalid in its current application, although the precise scope of the holding is unclear.[15] See also *Hansen* v. *Heckler*, No. 84-2366 (10th Cir. Feb. 5, 1986), slip op. 9-13. By contrast, the Sixth Circuit has expressly sustained the regulation, correctly construing it to provide for the denial of benefits to claimants who have "slight" or "minimal" impairments. See *Salmi* v. *Secretary of Health & Human Services*, 774 F.2d 685, 689-692 (1985); *Farris* v. *Secretary of Health & Human Services*, 773 F.2d 85, 89-90 (1985); *Gist* v. *Secretary of Health & Human Services*, 736 F.2d 352, 357-358 (1984). Other courts of appeals also have recognized the validity of the regulation when construed in this manner. See *Garza* v. *Heckler*, 771 F.2d 871-873 (5th Cir. 1985); *Stone* v. *Heckler*, 752 F.2d 1099, 1101-1103, 1106 (5th Cir. 1985); *Estran* v. *Heckler*, 745 F.2d 340, 341-342 (5th Cir. 1984); *Flynn* v. *Heckler*, 768 F.2d 1273, 1274-1275 (11th Cir. 1985); *Brady* v. *Heckler*, 724 F.2d 914, 918-920 (11th Cir. 1984). See also *Evans* v. *Heckler*, 734 F.2d 1012, 1014 (4th Cir. 1984). This circuit conflict warrants resolution by this Court.[16] The widespread litigation on the validity of the severity regulation

[15] District courts in two class actions in the Third Circuit have read *Baeder* broadly to bar the use of *any* severity step, even when it is limited to the denial of claims of individuals who have only minimal impairments. *Wilson* v. *Heckler*, No. 83-3771 (D.N.J. Oct. 9, Nov. 14, 1985), appeal pending, No. 85-5814 (3d Cir.); *Bailey* v. *Heckler*, No. 83-1797 (M.D. Pa. Dec. 3, 1985), appeal pending, No. 86-5038 (3d Cir.).

[16] The First Circuit recently heard oral argument is a case brought by an individual claimant that presents the question of the validity of the severity regulation. *Munoz* v. *Secretary of HHS*, No. 85-1728 (argued Feb. 6, 1986). The question of the validity of the regulation also is pending before the First, Second and Eighth Circuits on appeals from district court decisions invalidating the regulation in

has caused substantial disruption in the administration of the Social Security disability program, and it threatens even greater disruption in light of orders in a number of class actions requiring the reopening of past claims that were denied in reliance on the regulation. See notes 15 & 16, *supra*.

The question of the validity of the severity regulation is of broad practical significance in another respect as well. As we have explained (see pages 17, 19, *supra*), the Secretary and Congress have concluded that requirements of administrative flexibility and efficiency justify a preliminary screening of claimants at step 2 of the sequential evaluation process in order to determine whether their impairments are sufficently minimal to render it unnecessary for the state agency or the ALJ to undertake a full vocational evaluation of the claimant, including a specific consideration of his age, education, and work experience. Such administrative measures are essential in a benefits program of this magnitude, and Congress has expressly vested the Secretary with authority to implement them. See 42 U.S.C. 405(a); *Heckler* v. *Campbell*, 461 U.S. at 461 n.2 ("The need for efficiency is self-evident.").

Moreover, the procedure for assessing the severity of impairments is not entirely divorced from vocational considerations, as the court of appeals seemed to believe (App., *infra*, 9a), because the severity of an impairment must be gauged in terms of its impact on the claimant's ability to perform basic work-related functions. Nor is the procedure unfair to the claimant. Step 2 is designed to screen out those claimants whose impairment reasonably

state-wide class actions. See *McDonald* v. *Heckler*, No. 84-2190-G (D. Mass. Dec. 19, 1985), appeal pending (1st Cir.); *Dixon* v. *Heckler*, 589 F. Supp. 1494 (S.D.N.Y. 1984), appeal pending, No. 84-6288 (2d Cir.); *Campbell* v. *Heckler*, No. C-84-2085 (N.D. Iowa Oct. 21, Nov. 27, 1985), appeal pending, No. 86-1090NI (8th Cir.).

may be presumed not to preclude substantial gainful activity *irrespective* of their age, education, and work experience, and who therefore would be found not to be disabled at subsequent steps of the sequential evaluation process in any event. The court of appeals failed to appreciate these considerations. Its decision, which invalidates a regulation that is applied on a nationwide basis to scores of thousands of disability claims each month, plainly warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-4432

D.C. No. CV 82-953M

JANET J. YUCKERT, PLAINTIFF-APPELLANT,

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLEE.

Argued and Submitted
September 3, 1985—Seattle, Washington

Filed October 24, 1985

Amended January 7, 1986

Before: Eugene A. Wright, Sr. Circuit Judge,
Harry Pregerson and Arthur L. Alarcon, Circuit Judges.

Opinion by Judge Alarcon

Appeal from the United States District Court
for the Western District of Washington
Walter T. McGovern, Chief District Judge, Presiding

OPINION

ALARCON, Circuit Judge:

The Secretary of Health and Human Services denied Janet Yuckert's application for social security disability benefits on the ground that she did not suffer from a "severe impairment" within the meaning of 20 C.F.R. §§ 404.1520(c) and 404.1521 (1985). The district court

affirmed. Yuckert now challenges the validity of the severity regulation, 20 C.F.R. § 404.1520(c) (1985), as inconsistent with the Social Security Act. She argues that the regulation improperly permits the Secretary to find a claimant not disabled based solely on medical evidence, *see id.*, whereas the statute requires the Secretary additionally to consider the claimant's age, education, work experience, and ability to do her past work, *see* 42 U.S.C. § 423(d)(2)(A). Yuckert alternatively contends that substantial evidence does not support the Secretary's decision and that the Administrative Law Judge (ALJ) committed legal error by failing to give proper weight to the opinions of her treating physicians or to give proper reason for rejecting their opinions and the testimony of her vocational rehabilitation counselor. We find the Secretary's "severity" regulation invalid and reverse.

I

BACKGROUND AND FACTS

In October 1980, Yuckert applied for disability benefits under Title II of the Social Security Act. She alleged that she had been disabled since October 1979 as a result of dizziness, headaches, vision and equilibrium problems, and flat feet. After the denial of her application both initially and upon reconsideration. Yuckert requested a hearing before an ALJ.

At the time of her hearing, Yuckert was forty-five years old. She had a high school education, had completed some college classes, and was enrolled part-time in a computer programming training program. She worked as a travel agent from 1963 to 1977, and sporadically as a licensed real estate broker during 1978 and 1979, when she allegedly began suffering attacks of a debilitating illness.

Yuckert testified that she had been unable to work as a result of her illness because she has problems focusing and refocusing her eyes, can see only word at a time, is congested, lack stamina, has headaches, and must rest her eyes every thirty minutes while reading. Her dizziness and equibrium problems limit her ability to walk or drive: she walks cautiously, staying close to walls or counters, and although she drives 80 miles a week, she uses back and side roads and drives very slowly. She requires an excessive amount of sleep, usually taking two or more naps a day. She attends school, but only on a part-time basis.

Both of Yuckert's treating physicians concluded that she was disabled. Dr. Fretwall, an allergist, diagnosed Yuckert's problems as a syndrome of middle ear congestion. Dr. Wong, an otologist, diagnosed spontaneous nystagmus going to the left side and bilateral labyrinthine dysfunction. Both doctors noted that Yuckert's problems were not controlled by medication.

Finally, a vocational rehabilitation counselor, Mr. Mott, testified that Yuckert was incapable of returning to her past work and that she probably could not performing ony other job until her condition improved. Mott had administered a battery of vocational tests to Yuckert; she found that the results confirmed some of Yuckert's symptoms, particularly her vision problems.

The ALJ evaluated the foregoing evidence and Yuckert's claim under the Secretary's disability evaluation regulation, 20 C.F.R. § 404.1520 (1985). That regulation provides a five-step sequential procedure for determining disability, and allows the Secretary to find a claimant "not disabled" without reference to the vocational factor enumerated in the statute, 42 U.S.C. § 423(d)(2)(A). Here, the ALJ found Yuckert not disabled at step two of the procedure when he found that she did not suffer from a severe impairment that significantly limited her ability to perform basic work-related activities. *See* 20 C.F.R.

§ 404.1520(c) (1985). The ALJ thus did not consider whether Yuckert could do her past work or whether she could do any other work, considering her age, education, and work experience.

The Appeals Council denied Yuckert's request for review, and the ALJ's decison became the final decision of the Secretary. Yuckert sought review in the district court. The magistrate assigned to her case determined that substantial evidence supported the determination that she did not have a severe impairment. The district court adopted the magistrate's opinion and affirmed the Secretary's decision. Yuckert timely appeals.

II

DISCUSSION

Yuckert contends that the "severity" regulation, 20 C.F.R. § 404.1520(c) (1985), is invalid because it conflicts with the language of the Social Security Act, 42 U.S.C. § 423(d)(2)(A), by permitting the Secretary to find a claimant not disabled based solely on medical evidence, without regard to vocational factors, such as the claimant's age, education, work experience, and ability to perform past work. Yuckert raises this issue for the first time on appeal. As a preliminary matter, we consider the Secretary's contention that Yuckert's failure to challenge the regulation below precludes her from raising the issue here.

Generally, we will not consider an argument on appeal if the parties failed to raise it below. *Abex Corp. v. Ski's Enterprises, Inc.*, 748 F.2d 513, 516 (9th Cir. 1984); *Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Investment Corp.*, 711 F.2d 902, 905 (9th Cir. 1983). Nevertheless, we recognize an exception to this rule where the issue on

appeal is purely one of law that is both central to the case and important to the public. *Abex Corp.*, 748 F.2d at 516; *In re Sells*, 719 F.2d 985, 990 (9th Cir. 1983). Here, our consideration of the issue will not require the parties to develop new facts; moreover, the validity of the severity regulation presents a significant question of general impact. *See In re Howell*, 731 F.2d 624, 627 (9th Cir.), *cert. denied*, 105 S.Ct. 330 (1984). Thus, we exercise our discretion to consider the issue in spite of Yuckert's failure to raise it in the district court. *See Chico v. Schweiker*, 710 F.2d 947, 952 (2d Cir. 1983).

A. *The Validity of the Regulation*

The Social Security Act provides that certain individuals who are "under a disability" shall receive disability benefits. 42 U.S.C. § 423(a)(1)(D).[1] The Act defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The Act further provides that a claimant will be found disabled only if his impairment(s) "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . ." 42 U.S.C. § 423(d)(2)(A). Thus, on its face, the statute contemplates that the Secretary will consider both medical and vocational factors in awarding benefits. *See Delgado v. Heckler*, 722 F.2d 570, 572-573 (9th Cir. 1983) (discussing 42 U.S.C. §§ 1382c(a)(3)(A) and (B), which contain definitions of disability identical to 42 U.S.C. §§ 423(d)(1)(A) and (d)(2)(A)).

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[1] The Act's requirements concerning insured status and retirement age are not at issue here. *See* 42 U.S.C. § 423(a)(1).

Nevertheless, in 1978, the Secretary promulgated a regulation pursuant to her rulemaking authority under 42 U.S.C. § 405(a) which permits her to determine disability without reference to the vocational factors set forth in 42 U.S.C. § 423(d)(1)(A). *See* 20 C.F.R. § 404.1520(c) (1985) (original version at 20 C.F.R. § 404.1503 (1979)).[2] Under this regulation, the ALJ follows a five-step sequential analysis for evaluating disability. *Id.; Key v. Heckler,* 754 F.2d 1545, 1548 (9th Cir. 1985). If the ALJ finds the claimant not disabled at any step in the evaluation, he does not consider the remaining steps. 20 C.F.R. § 404.1520(a) (1985); *Stone v. Heckler,* 752 F.2d 1099, 1100 (5th Cir. 1985).

The first step requires the ALJ to determine whether the claimant is currently working. 20 C.F.R. § 404.1520(b) (1985). If the claimant is working, the ALJ must find her not disabled. *Id.* If the claimant is not working, however, the second step requires the ALJ to determine whether the claimant suffers a severe impairment. 20 C.F.R. § 404.1520(c) (1985). The regulations define a severe impairment as one that significantly limits the claimant's "ability to do basic work activities." 20 C.F.R. § 404.1521(a) (1985). Basic work activities mean "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. § 404.1521(b) (1985).[3] The ALJ must evaluate the

[2] Neither the 1980 amendment nor the 1985 amendment to the regulation alters our substantive analysis.

[3] The regulation gives examples of such activities, including:

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling.
(2) Capacities for seeing, hearing, and speaking;
(3) Understanding, carrying out, and remembering simple instructions;
(4) Use of judgment;
(5) Responding appropriately to supervision, co-workers and usual work situations; and
(6) Dealing with changes in a routine work setting.

20 C.F.R. § 404.1521(b) (1985).

severity of an impairment without reference to vocational factors. 20 C.F.R § 404.1520(c) (1985).[4] Only if the ALJ finds the claimant's impairment(s) severe does he proceed to the next three steps of the sequential analysis, under which he is required to consider the claimant's age, education, work experience, and ability to perform past work. *See* 20 C.F.R. § 404.1520(d)-(f) (1985).[5]

The Secretary contends that the second step of this sequential analysis is valid because it promotes efficiency without violating the provisions of the Social Security Act. She specifically argues that: (1) the regulation is entitled to great deference because it was properly promulgated pursuant to her authority under 42 U.S.C. § 405(a); (2) requiring the ALJ to determine whether the claimant's impairment is severe before considering vocational factors is consistent with the express language of the Act; and (3) the legislative history of the Act, in particular Congress'

[4] The second step, here challenged, provides in full:

(c) You must have a severe impairment. If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not have a severe impairment.

20 C.F.R. § 404.1520(c) (1985).

[5] Under the third step, the ALJ considers whether the impairment equals one of the listed impairments found in Appendix 1 of the regulations. 20 C.F.R. § 404.1520(d) (1985). If the impairment is listed, the ALJ must find the claimant disabled. *Id.* If the impairment is not listed, however, the fourth step requires him to ascertain whether the claimant can do past relevant work. 20 C.F.R. § 404.1520(e) (1985). Finally, the fifth step, reached only if the claimant cannot perform past work, dictates that the ALJ evaluate whether the claimant can do any other work, given her age, education, and work experience. 20 C.F.R. § 404.1520(f) (1985).

failure to eliminate the "severity regulation" in the 1984 Amendment, supports her position with respect to the regulation.

We agree with the Secretary that we must accord deference to her interpretation of the Act. *Key v. Heckler*, 754 F.2d 1545, 1552 (9th Cir. 1985); *see Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981); *Batterton v. Francis*, 432 U.S. 416, 426 (1977). Congress has delegated to the Secretary broad power "to prescribe standards for applying certain section of the [Social Security] Act." *Gray Panthers*, 453 U.S. at 43; 42 U.S.C. § 405(a). Nevertheless, the Secretary's power is not unlimited; the regulations she enacts must be consistent with the provisions of the Act, 42 U.S.C. § 405(a), and "cannot supersede the language chosen by Congress." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). Thus, we will declare the regulation invalid if we find that the Secretary exceeded her statutory authority or if the regulation is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Key*, 754 F.2d at 1552; *see Heckler v. Campbell*, 461 U.S. at 466; *Batterton v. Francis*, 432 U.S. at 426.

This circuit has previously noted the apparent "lack of symmetry" between the Secretary's severity regulation and the provisions of the Social Security Act. *Key v. Heckler*, 754 F.2d 1545, 1552 (9th Cir. 1985); *Delgado v. Heckler*, 722 F.2d 570, 574 (9th Cir. 1983). Although we have previously declined to rule on the validity of the sequential procedure, we now find, along with the Third and Seventh Circuits, that the regulation violates the Act because it does not permit the individualized assessment of disability required by the Act.[6] *See Johnson v. Heckler, 769 F.2d*

[6] Several circuits have upheld the severity regulations by construing the threshold severity showing as a "de minimis" requirement. *See, e.g., Farris v. Secretary of Health and Human Services*, No. 84-5808, slip op. at 8 (6th Cir. September 18,1985); *Estran v. Heckler*, 745 F.2d 340, 341 (5th Cir. 1984); *Evans v. Heckler*, 734 F.2d 1012, 1014 (4th Cir. 1984); *Brady v. Heckler*, 724 F.2d 914, 920 (11th Cir. 1984) (per curiam); *Chico v. Schweiker*, 710 F.2d 947, 954-55 & n.10 (2d Cir. 1983).

The government has submitted as supplemental authority a new Social Security Ruling which attempts to clarify policy on step two of the sequential process. The ruling was signed September 17 and has not yet been published. We note, however, that it adopts the "slight abnormality" or "de minimis" interpretation taken by at least five of the circuits. We express no view as to the validity of the new ruling because it is unpublished and because we hold that the regulation it interprets is inconsistent with the Social Security Act.

1202, 1210-13 (7th Cir. 1985); *Baeder v. Heckler*, 768 F.2d 547, 551-53 (3d Cir. 1985); *Dixon v. Heckler*, 589 F.Supp. 1494 1502-06 (S.D.N.Y. 1984). *See also Heckler v. Campbell*, 461 U.S. at 467 (discussing the statutory scheme for individual determinations).

First, as we have noted, the regulation, on its face, conflicts with the language of the statute that requires the Secretary, in determining disability, to consider factors such as age, education, work experience, and ability to do past work. 42 U.S.C. § 423(d)(2)(A). *See Delgado*, 722 F.2d at 574; *Johnson*, 769 F.2d at 1212; *Baeder*, 768 F.2d at 551. We find the Secretary's argument that the regulation is not inconsistent with this language or the statutory purpose belied by the express statutory requirement that both medical and vocational factors be considered in determining disability.

Second, we reject the Secretary's contention that the legislative history of the Act, particularly the 1984 Amendment, supports the sequential evaluation process. Although Congress apparently considered the severity regulation when enacting the 1984 Amendment, we agree with the Seventh Circuit that Congress did not endorse the Secretary's application of the regulation. *See Johnson*, 769 F.2d at 1211-12. Rather Congress was "concerned" that the Secretary was not "using criteria that clearly reflect the

intent of Congress that all those who are unable to work receive benefits." H.R. Rep. No. 618, 98th Cong., 2d Sess. 7, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3038, 3044-45. Although failing to eliminate the "severe impairment" requirement in the regulation, Congress urges the Secretary to revise her criteria "to reflect the real impact of impairments on the ability to work." *Id.* at 3045. *See also Johnson,* 769 F.2d at 1211-12 (containing a fuller discussion of the legislative history). The legislative history does not suggest that Congress intended to permit findings of non-disability based on medical factors alone. *Baeder,* 768 F.2d at 551-52.[7]

Third, the regulation ignores the long-established precedent of this and other circuits that disability determinations be made according to a two-step process, with the claimant first showing an inability to perform past revelant work, and the Secretary then showing that the claimant nevertheless retains the ability to do other work. *See, e.g., Valencia v. Heckler,* 751 F.2d 1082, 1086 (9th Cir. 1985); *Francis v. Heckler,* 749 F.2d 1562, 1564 (11th Cir. 1985); *Channel v. Heckler,* 747 F.2d 577, 579 (10th Cir. 1984) (per curiam); *Whitney v. Schweiker,* 695 F.2d 784, 786 (7th Cir. 1982); *Hall v. Secretary of Health, Education & Welfare,* 602 F.2d 1372, 1375 (9th Cir. 1979).[8] Because the severity regulation ignores vocational

[7] The absence of support for the Secretary's position in either the statute or the legislative history is fatal to her claim that the severity regulation promotes efficiency. As the Seventh Circuit correctly concluded: "[E]fficiency arguments provide absolutely no basis for the Secretary to violate Congressional mandates to implement properly the disability benefits program of this nation." *Johnson v. Heckler,* 769 F.2d at 1213.

[8] Indeed, the Secretary has issued a ruling, binding on all Social Security Administration personnel, that specifically states that disability benefits may be denied "even though [the impairment] may prevent the individual from doing work that the individual has done in the past." Social Security Ruling 82-56. In another ruling, the

factors where a claimant's impairment is found non-severe, the regulation conflicts with this precedent and thus improperly denies benefits to a claimant who has made a prima facie showing of disability. *See Johnson,* 769 F.2d at 1210; *Baeder,* 768 F.2d at 553.[9]

In light of our legal conclusions and considering the specific facts of Yuckert's case, we hold that the severity regulation, 20 C.F.R. § 404.1520(c) (1985), is inconsistent with the Social Security Act and, therefore, is invalid.

B. *Substantial Evidence and Legal Error*

Because we find that the ALJ based his decision on an invalid regulation, we need not decide whether substantial evidence supports the Secretary's finding of no severe impairment. Moreover, because the ALJ will have to reconsider the evidence without regard to the severity regulation and issue a new opinion, we need not determine whether he gave proper weight to the opinions of Yuckert's treating physicians or whether he gave proper reasons for rejecting their opinions and the testimony of her vocational rehabilitation counselor.

CONCLUSION

We hold that the "severity regulation," 20 C.F.R. § 404.1520(c) (1985), is inconsistent with the provisions of the Social Security Act and is therefore invalid. Accordingly, we reverse the decision of the district court and

Secretary established a list of impairments that will be considered per se non-severe under step two of the severity regulation. Social Security Ruling 82-55.

[9] Interestingly, the Third Circuit in *Baeder* notes that the Secretary denied benefits to 40.3 percent of disability applicants without any evaluation of their age, education, or past work experience. *Baeder,* 768 F.2d at 552.

remand with instructions that the Secretary reevaluate Yuckert's claim without reference to the severity regulation, 20 C.F.R. § 404.1520(c) (1985).

REVERSED AND REMANDED.

APPENDIX B

JUDGMENT

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 84-4432

CV 82-953M

JANET J. YUCKERT, PLAINTIFF-APPELLANT,

v.

MARGARET M. HECKLER, DEFENDANT-APPELLEE.

APPEAL from the United States District Court for the

_____ District of _____

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the

WESTERN District of WASHINGTON (SEATTLE) ____

_____

_____ and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is REVERSED & REMANDED.

Filed and entered OCTOBER 24, 1985

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C82-953M

JANET J. YUCKERT, PLAINTIFF,

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

ORDER

The Court has reviewed the entire record, including the administrative record, the memoranda of the parties, and the Report and Recommendation of United States Magistrate John L. Weinberg. It is therefore ORDERED:

(1) The Court adopts the Report and Recommendation;
(2) The Court affirms the decision of the Secretary of Health and Human Services; and
(3) The Clerk shall direct copies of this order to all counsel and to Magistrate Weinberg.

Dated this 24th day of Oct. 1984.

/s/ WALTER T. MCGOVERN
Chief United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C82-953M

JANET J. YUCKERT, PLAINTIFF,

v.

MARGARET M. HECKLER,* SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

BASIC DATA

Type of benefits sought:
(x) Disability Insurance
(x) Supplemental Security Income – Disability
( ) Other:

Plaintiff's:
Sex: Female
Age (as of hearing before ALJ): 45

Principal Disability(s) Alleged by Plaintiff:
(1) Bilateral labyrinthine dysfunction, resulting in dizziness, vision impairment (inability to focus), and severe headaches.
(2) Feet – bad arches.

Disability Allegedly Began: January 2, 1980.

Principal Previous Work Experience (with dates or duration):
(1) Travel Agent, 1963-1977
(2) Real Estate Sales, 9/78-9/79 (with interruptions for illness)

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* Substitution of defendant, pursuant to F.R.Civ. P. 25(d)

(3) Part-time job with United Parcel Service, one week in 11/79

Plaintiff Last Worked (Date): 11/79

Education Level Achieved by Plaintiff: High school graduate, various college courses

Is there any issue as to whether plaintiff has sufficient quarters of work to be eligible for benefits? No.

PROCEDURAL HISTORY – ADMINISTRATIVE

Before ALJ:

Date of Hearing (if any): 9/9/81
Date of Decision : 12/22/81
Appears in record at : R. 21-25
Summary of Decision : Plaintiff does not have a "severe impairment." No objective medical findings substantiate the symptoms of which she complains. Her successful participation in college computer courses reinforces this conclusion.

Before Appeals Council:

Date of Decision : 6/25/82
Appears in record at : R. 4-5
Summary of Decision : Affirmed decision of ALJ. Difficulty in small detailed parts dexterity does not preclude any substantial gainful activity.

PROCEDURAL HISTORY – THIS COURT

Jurisdiction based upon : (x) 42 U.S.C. § 405(g)
( ) Other:

Brief of Merits submitted by (x) Plaintiff (x) Secretary.
Oral Argument (x) Not requested ( ) Conducted on

RECOMMENDATION OF UNITED STATES MAGISTRATE

Affirm the ALJ's determination that plaintiff has not established the existence of a "severe impairment."

DISCUSSION

In determining plaintiff's disability claim, the Secretary, and the court, are required to apply the sequential analysis described in 20 C.F.R. § 404.1520.

Plaintiff is not working, and has not worked since November, 1979. School attendance is generally not considered to be "substantial gainful activity." § 404.1572(c).

It is plaintiff's burden, however, to establish that she has a "severe impairment" i.e., an impairment which significantly limits her physical or mental ability to do basic work activities. § 404.1520(c).

The regulations define "basic work activities" as:

> ". . . the abilities and aptitudes necessary to do most jobs. Examples of these include –
>
> (1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;
>
> (2) Capacities for seeing, hearing, and speaking;
>
> (3) Understanding, carrying out, and remembering simple instructions;
>
> (4) Use of judgment;
>
> (5) Responding appropriately to supervision, co-workers and usual work situations; and
>
> (6) Dealing with changes in a routine work setting."

§ 404.1521(b).

In finding that plaintiff did not suffer from a severe impairment, the Secretary in essence found that her impairment did not significantly limit her physical and mental abilities to do "basic work activities." This court must determine whether there is substantial evidence to support that conclusion.

The evidence is conflicting on this point. Perhaps the strongest support for the Secretary's conclusion is that plaintiff was successfully participating in a course of study

in computer programming at a community college. This course required her to spend three hours per day in class, five days per week. Each day after concluding her classes and a nap, she devotes six to eight hours of homework, ending about midnight. (R. 48-9)

Plaintiff's success in this program is substantial evidence of her ability to perform basic work activities. This conclusion is reinforced by the observations of her counsellor at the Department of Vocational Rehabilitaton of the State of Washington. "DVR" suggested and sponsored the community college course of study for plaintiff. While thoroughly familiar with plaintiff's impairments, her counsellor expressed the view that, once trained, she will have little problem in obtaining employment.

> "DVR thinks that the training is appropriate for Janet in all areas: 1) capabilities, 2) interests and most importantly, 3) within her medical limitations." (R 192-3).

While this determination by another agency is by no means conclusive, it is evidence supporting the Secretary's consistent conclusion.

The record also includes a "functional assessment" apparently completed and signed by a Dr. Joseph Robin (R. 188). Dr. Robin concluded there were very few limitations upon plaintiff's ability to perform basic work activities. It is not clear from the record, however, who Dr. Robin is, whether he ever examined plaintiff, and what was the basis for his conclusions.

On the other hand, Dr. Wong, plaintiff's treating physician, concluded that her impairment was incapacitating, and that she would be disabled for an indefinite period of time. (R. 160). Dr. Janet Mott, a vocational expert, administered a battery of tests to plaintiff. Ms. Mott concluded plaintiff would not be employable until her condition improved. (R. 72-80).

The record therefore contains conflicting evidence as to whether plaintiff suffers from a severe impairment. It is the function of the Secretary, however, not of this court, to weigh that evidence and to resolve the issue. Because there is substantial evidence in support of the Secretary's conclusion, this court is required to affirm her determination.

A proposed order accompanies this Report and Recommendation.

DATED this 9 day of May, 1984.

/s/ JOHN L. WEINBERG

John L. Weinberg
United States Magistrate

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C82-953M

JANET J. YUCKERT, PLAINTIFF,

v.

MARGARET M. HECKLER, SECY.,
HEALTH & HUMAN SERVICES, DEFENDANT.

JUDGMENT

This matter having come on for consideration before the Court, Honorable Walter T. McGovern, Chief United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED, that the decision of the Secretary is hereby affirmed.

DATED this 25th day of October, 1984.

Deputy United States District Clerk

APPENDIX F

DEPARTMENT OF HEALTH & HUMAN SERVICES — Social Security Administration

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Refer to:
SCC
531-34-8353

Office of Hearings and Appeals
PO Box 2518
Washington DC 20013

June 25, 1982

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Ms. Janet L. Yuckert
13725 56th Ave., S., 1207
Seattle, WA 98168

Dear Ms. Yuckert:

Re: Your Claims for Disability Insurance Benefits and Supplemental Security Income

The request for review of the hearing decision in your case has been considered.

Sections 404.970 and 416.1470 of Social Security Administration Regulations Nos. 4 and 16 (20 CFR 404.970 and 416.1470) provide that the Appeals Council will grant a request for review of a hearing decision where: (1) there appears to be an abuse of discretion by the administrative law judge; (2) there is an error of law; (3) the administrative law judge's action, findings, or conclusions are not supported by substantial evidence or (4) there is a broad policy or procedural issue which may affect the general public interest. These sections also provide that where new and material evidence is submitted with the request for review, the entire record will be evaluated and

review will be granted where the Appeals Council finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record.

The Appeals Council has concluded that there is no basis under the above regulations for granting the request for review. Accordingly, your request is denied and the hearing decision stands as the final decision of the Secretary in your case.

In reaching this conclusion, the Appeals Council has considered the multiple psychological testing data submitted by your representative in-Ex. AC-2 conjunction with your request for review. The various testing devices were utilized by the vocational expert in her evaluation of your vocational capabilities. The over-all results of all the testing indicated an average range of intellectual abilities, with no profound irregularities and the majority of skills still fully intact. Only the finger dexterity test administered showed a degree of difficulty. The Appeals Council notes in that regard that the limitations potentially imposed by the difficulty you might experience in small detailed parts dexterity does not indicate an inability to perform any substantial gainful activity. The weight of the entire evidence of record in your case, including the new evidence, supports the administrative law judge's finding that you do not have any significant impairment of work-related abilities.

The Appeals Council has also carefully considered each of the contentions raised by your representative in his brief of April 5, pg. 7-17 1982. The Appeals Council believes that the administrative law judge's decision was based on substantial evidence in the record, and that the administrative law judge did consider all the evidence of record in reaching his decision. The Appeals Council sees no reason to grant your request for review.

If you desire a court review of the hearing decision, you may commence a civil action in the district court of the United States in the judicial district in which you reside within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing is otherwise made. See sections 205(g) and 1631(c)(3) of the Social Security Act, as amended (42 U.S.C.(g) and 1383(c)(3)) and section 422.210 of Social Security Administration Regulations No. 22 (20 CFR 422.210).

If a civil action is commenced, your complaint should name the Secretary of Health and Human Services as the defendant and should include the Social Security number(s) shown at the top of this notice.

Sincerely yours,

Lawrence Weiner
Member, Appeals Council

cc:
James A. Douglas, Esq.
Seattle, WA 98104

HO, Seattle, WA (ALJ Sode)

APPENDIX G

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION

In the case of Janet L. Yuckert	Claim for Period of Disability, Disability Insurance Benefits and Supplemental Security Income
(Claimant)	
(Wage Earner) (Leave blank if same as above)	531-34-8353 (Social Security Number)

This case is before the Administrative Law Judge on a request for hearing.

ISSUES

The general issues before the administrative law judge are whether the claimant is entitled to a period of disability and to disability insurance benefits under sections 216(i) and 233, respectively, of the Social Security Act; and whether the claimant is disabled under section 1614(a)(3) of the Social Security Act. The specific issues are whether the claimant was under a "disability" as defined in the Act and, if so, when such "disability" commenced and the

duration thereof; and whether the special earnings requirements of the Act are met for the purpose of entitlement to a period of disability and disability insurance benefits.

LAW AND REGULATIONS

Section 216(i) of the Social Security Act provides for the establishment of a period of disability, and section 223 of the Act provides for the payment of disability insurance benefits where the requirements specified therein are met.

Section 223(d)(1) and 1614(a)(3)(A) of the Social Security Act (42 U.S.C. 423(d)(1) and 42 U.S.C. 1382c(a)(3)(A)) define disability as the inability to "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. . . ."

Sections 223(d)(3) and 1614(a)(3)(C) of the Act define a "physical or mental impairment" as "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

Sections 404.1520(c) and 416.920(c)) of Social Security Administration Regulations Nos. 4 and 16, respectively, (20 CFR 404.1520(c) and 416.920(c)) provide that if an individual does not have any impairments which significant limit physical or mental ability to do basic work activities, a finding shall be made that the individual does not have a severe impairment and, therefore, is not disabled regardless of age, education, and work experience.

Regulations 404.1521(b) and 416.921(b) (20 CFR 404.1521(b) and 416.921(b)) define basic work activities to mean the abilities and aptitudes necessary to do most jobs. Examples of these abilities and aptitudes include physical

functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; capacities for seeing, hearing, and speaking; understanding, carrying out, and remembering simple instructions; use of judgement; responding appropriately to supervision, co-workers, and usual work situations; and dealing with changes in a routine work setting.

EVIDENCE CONSIDERED

The Administrative Law Judge has carefully considered all the testimony at the hearing, the arguments made, and the documents described in the List of Exhibits attached to this decision.

EVALUATION OF THE EVIDENCE

This 45 year old travel agent with a high school education, 2 years of business college and real estate training alleges she has been unable to work since October 9, 1979, due to a combination of impairments including dizziness, vision loss and foot problems.

Her duties included writing airline tickets, planning travel schedules, making travel facilities reports and she used office mackines in performing these duties for 15 years.

The objective diagnostic clinical findings are imprecise in this case. Dr. Marsha Fretwell of the allergy clinic at the Harborview Medical Center diagnosed her problems as non-specific congestion of the nasal and middle ear mucous membranes.

Otologist, Dr. Matthew L. Wong, diagnosed her problems of dizziness and focusing as most likely labyrinthine in origin and bilateral. She has a spontaneous nyatagmus going to the left side. X-rays of the internal auditory canals, electronystagmogram and brain stem evoked

response and audiometry were normal. She was extensively worked up by the Public Health Hospital and they did not feel she had multiple sclerosis. (Exhibit 23)

Multiple tests given, though claimant failed to divulge objective clinical findings of abnormalities that support the claimant's severity of the stated impairments for 12 continuous months. X-rays of her internal auditory canal revealed no abnormality. Her EKG was normal. Skull X-rays were normal and a spinal puncture was not informative. (Exhibits 17 and 19)

The claimant testified she has a tendency to fall to the right, but catches herself and has never fallen. She can not stand more than three quarters of an hour at one time. She drives her car 80 to 90 miles a week.

In January 1981, the claimant commenced a 2 year community college training plan for computer programming. She successfully completed 11 credit hours that quarter and is currently continuing that course on a half day basis.

Vocational Expert, Janet Mott, testified that claimant is within the average range of intelligence, has a 12th grade educational skills and an above average memory. The claimant has poor eye/hand coordination, poor concentration and is operating under a great deal of stress.

Although Dr. Mott concluded the claimant's medical condition would preclude her from working competitevely, the objective clinical diagnostic findings of record do not support the conclusion that the claimant is "disabled". Symptoms alone do not establish there is a physical or mental impairment. Medical signs of findings should be accompanied by a medical condition that could reasonably be expected to produce the symptoms.

The claimant failed to produce substantial medical evidence to support a finding that her physical abilities to do basic work activities were significantly limited. Although she alleges that her activities have been somewhat reduced she is successfully completing a

relatively difficult higher education course learning the language of computers. This achievement, coupled with generally negative clinical findings, her activities, e.g., driving her car, visiting with friends, all indicate to the undersigned that claimant's vision and balance problems are not severely physically restrictive as defined by Section 404.1521, Regulations No. 4 of 20 CFR.

This is not to say that the claimant is free from episodes of dizziness, or vision problems, but that the greater weight of the evidence fails to establish she suffers from a severe condition, and in accordance with the Social Security Act and Regulations promulgated by the secretary may not be considered to be "disabled." Claimant appears to be overemphasizing the effect of her impairments on her ability to perform basic functions.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant meet the special earnings requirements through the date of this decision.
2. Claimant alleges labyrinth with occasional episodes of dizziness and loss of focus; and flat feet.
3. Claimant is exaggerating the effects of her impairments.
4. The claimant's medical condition does not significantly limit her ability to perform basic work-related functions, e.g., real estate salesperson.
5. Claimant does not have any impairment or impairments which significantly limit her ability to perform basic work-related functions; therefore she does not have a severe impairment.
6. Since the claimant does not have a severe impairment, she may not be considered "disabled" within the meaning of the Social Security Act, as amended.

DECISION

It is the decision of the Administrative Law Judge that based on her applications of October 23, 1980, the claimant is not entitled to a period of disability or to disability insurance benefits under sections 216(i) and 223, or to Supplemental Security Income, under Section 1611, respectively, of the Social Security Act, as amended.

/s/ WILLIAM T. SODE

William T. Sode
Administrative Law Judge

DATED December 22, 1981

APPENDIX H

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 223(d)(1)(A) and (2)(A) of the Social Security Act, as codified at 42 U.S.C. 423(d)(1)(A) and (2)(A), provides:

(d) "Disability" defined

(1) The term "disability" means–

(A) inability to engage in any substantial gainful acitivity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; * * *

* * * * *

(2) For purposes of paragraph (1)(A)–

(A) an individual (except a widow, surviving divorced wife, or widower for purposes of section 402(e) or (f) of this title) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

2. Section 1614(a)(3)(A) and (B) of the Social Security Act, as codified at 42 U.S.C. 1382c(a)(3)(A) and (B), provides:

(3)(A) An individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).

(B) For purposes of subparagraph (A), an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

3. Section 223(d)(2)(C) of the Social Security Act, as added by Section 4(a)(1) of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1800, provides:

"(C) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the

individual's impairments without regard to whether any such impairment if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.".

4. Section 1614 (a)(3)(G) of the Social Security Act, as added by Section 4(b) of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1800, provides:

"(G) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.".

5. 20 C.F.R. 404.1520, 404.1521, 416.920 and 416.921 provide:

§ 404.1520 Evaluation of disability in general.

(a) *Steps in evaluating disability.* We consider all material facts to determine whether you are disabled. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education,

and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further.

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not have a severe impairment.

(d) *When your impairment(s) meets or equals a listed impairment in Appendix 1.* If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment(s) must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment(s) must prevent you from doing any other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see § 404.1562).

§ 404.1521 What we mean by an impairment(s) that is not severe.

(a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.

(b) *Basic work activites.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, coworkers and usual work situations; and

(6) Dealing with changes in a routine work setting.

6. 20 C.F.R. 416.920 and 416.921 provide:

§ 416.920 Evaluation of disability in general.

(a) *Steps in evaluating disability.* We consider all material facts to determine whether you are disabled. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education,

and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further.

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your mental condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.

(d) *When your impairment(s) meets or equals a listed impairment in Appendix 1.* If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment(s) must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment(s) must prevent you from doing other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work, If you cannot, we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can on longer do this kind of work, we use a different rule (see § 416.962).

[50 FR 8728, Mar. 5, 1985]

§ 416.921 What we mean by an impairment(s) that is not severe.

(a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it does not significantlv limit your physical or mental ability to do basic work activities.

(b) *Basic work activities.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, coworkers and usual work situations; and

(6) Dealing with changes in a routine work setting.

APPENDIX I

SOCIAL SECURITY RULING (SSR) 85-28

(PPS-122) SSR 85-28

TITLES II AND XVI: MEDICAL IMPAIRMENTS THAT ARE NOT SEVERE

PURPOSE: To clarify the policy for determining when a person's impairment(s) may be found "not severe" and, thus, the basis for a finding of "not disabled" in the sequential evaluation of disability, and thereby reflect certain circuit court decisions that have taken issue with the Secretary's previously stated definition of "not severe" impairments.

CITATIONS (AUTHORITY): Sections 216(i), 223(d), and 1614(a)(3)(A) of the Social Security Act, as amended; Regulations No. 4, sections 404.1520-404.1523 and Regulations No. 16, sections 416.920-416.923.

PERTINENT HISTORY: The basic definition of disability is contained in sections 223(d)(1)(A) and 1614(a)(3)(A) of the Act. Under this definition, an individual must have, as an initial requirement, a "physical or mental impairment," as defined in sections 223(d)(3) and 1614(a)(3)(C), and which is expected either to result in death or to last at least 12 months. The principal requirement regarding impairment severity contained in the basic statutory definition of disability is that the individual's inability to engage in any substantial gainful activity (SGA) be "be reason of" the impairment.

In reporting on the Social Security Amendments of 1954 which first introduced the basic definition of disability into the Act, the Senate Committee on Finance indicated that the definition required that there be a "medically determinable *impairment of serious proportions*," that is,

"of a nature and degree of severity sufficient to justify its consideration as the cause of failure to obtain any substantial gainful work."

In the Social Security Amendments of 1967, Congress introduced into the Act the provision in section 223(d)(2)(A) which sets out a specific requirement respecting impairment severity and which provides for the consideration of vocational factors in determining disability: An individual ". . . shall be determined to be under a disability only if his *physical or mental impairment or impairments are of such severity* that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any kind of substantial gainful work which exists in the national economy . . ." (emphasis added). In reporting on these amendments, both the Senate Committee on Finance and the House Committee on Ways and Means reaffirmed the need for some assurance that a finding of disability would be based on a *serious impairment*. The Committees explained that the provisions of the amendment would require, in part, that:

". . . an individual would be disabled *only if it is shown that he has a severe medically determinable physical or mental impairment or impairments* . . ." (emphasis added).

As in 1954 and 1967, Congress, again, in the Social Security Disability Benefits Reform Act of 1984, made it clear that a denial of disability benefits may be based on medical factors alone. In amending section 223(d)(2) and section 1614(a)(3) of the Act to provide for the evaluation of the impact of multiple impairments throughout the sequential evaluation process, Congress introduced language which affirms the presence of a severity threshold in the adjudicative process:

"In determining whether an individual's physical or mental impairment or impairments are *of a sufficient medical severity that such impairment or impairments could be the basis of eligiblity under this section,* the Secretary shall consider the combined effect of all of the individual's impairments. . . ."

The validity of a disability decision based on medical considerations alone was also recognized in the Conferees' discussion of the amendment (House of Representatives Conference Report 98-1039 to accompany H.R. 3755. September 19, 1984, p. 30) in which it was stated that there was no intention to "either eliminate or impair" the use of the "current sequential evaluation process."

The principle that a denial determination may be made on the basis of medical considerations alone was first reflected in Regulations No. 4, section 404.1502(a), published in 1960. Regulations published in 1978 revised the 1960 statement concerning such determinations by replacing the phrase ". . .the only impairment is a slight neurosis, slight impairment of sight or hearing, or other slight abnormality or combination of slight abnormalities . . ." with ". . . The medically determinable impairment in not severe if it does not significantly limit an individual's physical or mental capacity to perform basic work-related functions."

This change in regulatory definition was introduced in the language describing step 2 of the sequential evaluation process which was formalized in regulations effective February 26, 1979. (The 1980 recodification of the Disability Regulations into common sense language reworded the definition of a not severe impairment as follows: "An impairment is not severe if it does not significantly limit your physical or mental abilities to do basic work activities." 20 C.F.R. 404.1521(a) and 416.921(a). Also see sections 404.1520(c) and 416.920(c).) These changes in regulatory language were *not* intended to alter the levels of severity for a finding of not disabled on

the basis of medical considerations alone. Rather, they were intended only to clarify the circumstances under which such a finding would be justified (*Federal Register*—March 7, 1978, p. 9296-9297; November 28, 1978, p. 55357-55358). Nevertheless, some recent circuit court decisions have taken exception to the threshold of impairment severity applied in the adjudication of subject cases which were denied on the basis of not severe impairment.

As observed by the Congress, the Social Security Administration (SSA), as part of an ongoing review, is reevaluating the application of the not severe impairment policy and will continue to do so. This ruling is part of the ongoing reevaluation and imterprets and clarifies the current policy on not severe impairment, describes the threshold intended, and reflects recent legislation. Also, it is being issued to clarify that SSA's policy is consistent with various court decisions. For example, *Stone* v. *Heckler*, 752 F.2d 1099 (5th Cir. 1985), and *Estran* v. *Heckler*, 745 F.2d 340 (5th Cir. 1984), stated that "an impairment can be considered as not severe only if it is a slight abnormality which has such a minimal effect on the individual that it would not be expected to interfere with the individual's ability to work irrespective of age, education, or work experience." As *Baeder* v. *Heckler*, No. 84-5663 (3rd Cir. July 24, 1985), suggested, the severity regulation is to do no "more than allow the Secretary to deny benefits summarily to those applicants with impairments of a minimal nature which could never prevent a person from working."

POLICY CLARIFICATION: In determining, for initial entitlement to benefits, whether an individual is disabled, we follow a sequential evaluation process whereby current work activity, severity and duration of impairment, ability to do past work, and ability to do other work (in light of the individual's age, education and

work experience) are considered, in that order. See 20 CFR sections 404.1520 and 416.920. In determining continuing entitlement to benefits, the adjudicator, with appropriate consideration of the medical improvement review standard, also follows a sequential evaluation process which includes the "not severe impairment" concept. Fundamental to these processes is the statutory requirement that to be found disabled, an individual must have a medically determinable impairment "of such severity" that it precludes his or her engaging in any substantial gainful work.

As explained in 20 CFR, sections 404.1520, 404.1521, 416.920(c), and 416.921, at the second step of sequential evaluation it must be determined whether medical evidence establishes an impairment or combination of impairments "of such severity" as to be the basis of a finding of inability to engage in any SGA. An impairment or combination of impairments is found "not severe" and a finding of "not disabled" is made at this step when medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered (i.e., the person's impairment(s) has no more than a minimal effect on his or her physical or mental ability(ies) to perform basic work activities). Thus, even if an individual were of advanced age, had minimal education, and a limited work experience, an impairment found to be not severe would not prevent him or her from engaging in SGA.

The severity requirement cannot be satisfied when medical evidence shows that the person has the ability to perform basic work activities, as required in most jobs. Examples of these are walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling; seeing, hearing, and speaking; understanding, carrying out, and

remembering simple instructions; use of judgement, responding appropriately to supervision, coworkers, and usual work situations; and dealing with changes in a routine work setting. Thus, these basic work factors are inherent in making a determination that an individual does not have a severe medical impairment.

Although an impairment is not severe if it has no more than a minimal effect on an individual's physical or mental ability(ies) to do basic work activities, the possiblity of several such impairments combining to produce a severe impairment must be considered. Under 20 CFR, section 404.1523 and 416.923, when assessing the severity of whatever impairments an individual may have, the adjudicator must assess the impact of the combination of those impairments on the person's ability to function, rather than assess separately the contribution of each impairment to the restriction of his or her activity as if each impairment existed alone. A claim may be denied at step two only if the evidence shows that the individual's impairments, when considered in combination, are not medically severe, i.e., do not have more than a minimal effect on the person's physical or mental ability(ies) to perform basic work activities. If such a finding is not clearly established by medical evidence, however, adjudication must continue through the sequential evaluation process.

Inherent in a finding of a medically not severe impairment or combination of impairments is the conclusion that the individual's ability to engage in SGA is not seriously affected. Before this conclusion can be reached, however, an evaluation of the effects of the impairment(s) on the person's ability to do basic work activities must be made. A determination that an impairment(s) is not severe requires a careful evaluation of the medical findings which describe the impairment(s) and an informed judgment about its (their) limiting effects on the individual's physical and mental ability(ies) to perform basic work activities;

thus, an assessment of function is inherent in the medical evaluation process itself. At the second step of sequential evaluation, then, medical evidence alone is evaluated in order to assess the effects of the impairment(s) on ability to do basic work activities. If this assessment shows the individual to have the physical and mental ability(ies) necessary to perform such activities, no evaluation of past work (or of age, education, work experience) is needed. Rather, it is reasonable to conclude, based on the minimal impact of the impairment(s), that the individual is capable of engaging in SGA.

By definition, basic work activities are the abilities and aptitudes necessary to do most jobs. In the absence of contrary evidence, it is reasonable to conclude that an individual whose impairments do not preclude the performance of basic work activities is, therefore, able to perform his or her past relevant work. If the medical evidence establishes only a slight abnormality(ies) which has no more than a minimal effect on a claimant's ability to do basic work activities, but evidence shows that the person cannot perform his or her past relevant work because of the unique features of that work, a denial at the "not severe" step of the sequential evaluation process is inappropriate. The inability to perform past relevant work in such instances warrants further evaluation of the individual's ability to do other work considering age, education and work experience.[1]

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[1] This provision does not conflict with, nor negate, the policy stated in SSR 82-63 concerning special "no recent or relevant work experience" cases. In such cases an individual must be found to have a severe impairment(s) (i.e., one which has more than a minimal effect on the person's physical or mental ability(ies) to perform basic work activities) in order to be considered under the special provisions of that Ruling.

Great care should be exercised in applying the not severe impairment concept. If an adjudicator is unable to determine clearly the effect of an impairment or combination of impairments on the individual's ability to do basic work activities, the sequential evaluation process should not end with the not severe evaluation step. Rather, it should be continued. In such a circumstance, if the impairment does not meet or equal the severity level of the relevant medical listing, sequential evaluation requires that the adjudicator evaluate the individual's ability to do past work, or to do other work based on the consideration of age, education, and prior work experience.

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